No. 08-1409

Supreme Court, U.S.
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In The Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

REPLY BRIEF FOR PETITIONER

JAMES C. OWEN
MCCARTHY, LEONARD & KAEMMERER, L.C.
400 S. Woods Mill Rd. #250
Chesterfield, MO 63017

DREW S. DAYS, III
BRIAN R. MATSUI*
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-8784

PAUL H. FRANKEL
IRWIN M. SLOMKA
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104

Counsel for Petitioner

**Counsel of Record*

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

Respondent does not contest that the issues in this case are of enormous financial significance for every business that sells goods at wholesale and every jurisdiction that imposes a gross receipts tax (1200 and counting). As petitioner Ford Motor Company and its *amici* Council on State Taxation and the National Association of Manufacturers (two leading trade associations representing the interests of more than 600 of the largest businesses in the United States) demonstrate, the Delaware tax—a gross receipts tax on purportedly in-state wholesaling—poses grave risks to the national economy by taxing 100 percent of the gross receipts from sales that occur outside the taxing State, and the decision below conflicts with the decisions of six other state courts. And, as the petition demonstrates, the Delaware tax is not an isolated legislative attempt by a State to improperly expand its taxing jurisdiction beyond its borders. The petition should be granted.

A. Respondent's Contention That A Tax On 100 Percent Of The Gross Receipts From Goods Physically Delivered To The State Need Not Reflect Where The Value Underlying Those Receipts Was Earned Cannot Be Reconciled With *Jefferson Lines*

1. Respondent contends that the Supreme Court of Delaware's decision is consistent with this Court's precedent because a "gross receipts tax" applied to all the "gross receipts from wholesale sales of goods delivered into a State is fairly apportioned

within the meaning of *Complete Auto Transit*," *Inc. v. Brady*, 430 U.S. 274 (1977), "regardless of whether the tax base is divided * * * by a destination test or by single sales factor formula apportionment." Opp. 6. According to respondent, the apportionment of a gross receipts tax on wholesaling never needs to be "measured by wholesaling activities" that occur among several States, *id.* at 9, only that it be measured by receipts from sales delivered to in-state customers.

The blanket contention that taxing receipts from deliveries to in-state buyers reflects fair apportionment finds no support in this Court's unequivocal statement in *Oklahoma Tax Commission v. Jefferson Lines, Inc.* that a gross receipts tax is "simply a variety of a tax on income, which [is] required to be apportioned *to reflect the location of the various interstate activities by which it was earned*." 514 U.S. 175, 190 (1995) (emphasis added). Yet the ruling below, as well as the decisions of several other state courts of last resort, *see* Pet. 12-16, violates *Jefferson Lines* by authorizing a tax on 100 percent of the gross receipts from goods delivered into the State—over $700 million worth of sales in this case—irrespective of where the sales occurred and where the value underlying those receipts was generated.

2. This case presents an ideal vehicle to address this issue of significant constitutional magnitude and enormous financial consequence to both States and business alike, at a time when businesses are

struggling and States are aggressively seeking to expand their tax bases to avoid paying their creditors with IOUs.

Notwithstanding respondent's claim and the state court ruling below that Delaware alone had the right to tax petitioner's gross receipts from sales to Delaware-based independent dealers, Pet. App. 15a, respondent repeatedly *concedes* that what amounts to the vast majority of Ford's wholesaling activities that generated those sales occurred in other States. *See, e.g.*, Opp. 11 ("Ford engages in the variety of activities that are comprised in the activity of wholesaling *in various states* * * * ." (emphasis added)).[1]

The *only* wholesaling activities that occurred within Delaware, even by respondent's own recitation of the facts, were the occasional visits that Ford's out-of-state district and regional sales managers made to independent dealers in Delaware. Pet. 8. But respondent and the Delaware court place too much emphasis on those visits, which are relevant only in that they satisfy the constitutional requirement of a

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[1] Among the concessions that make this case an ideal vehicle, respondent concedes that the following "Wholesaling Activities" occurred outside Delaware: (1) the forecasting process and the development of a sales plan for each dealership, (2) the creation of Sales and Service Agreements between Ford and the dealerships, (3) the development and implementation of extensive national advertising campaigns, (4) the transfer of title to the independent dealers, and (5) the post-sale transfer of possession of the vehicles to a common carrier for shipment to Delaware. Opp. 3-5.

sufficient nexus between the taxed activity and the taxing State. *Complete Auto*, 430 U.S. at 279. Their existence does not answer the question of *how much* tax may be imposed without any apportionment for activities conducted or value added outside its border.

B. Review Is Necessary Because States Are Misreading This Court's Pre-*Jefferson Lines* Precedents To Tax Economic Activity In Other States

1. No precedent of this Court permits imposition of a gross receipts tax based solely on sales and applying a "destination test"

Contrary to respondent's suggestion, Opp. 9-11, *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), is not a blank check for States to apply a single-factor apportionment formula for *all* taxation purposes.

a. Respondent ignores that the tax upheld in *Moorman* was not a gross receipts tax but a net income tax. *Id.* at 269, 270 n.3. This Court has held that States may tax an apportioned share of the *total* net income of a multistate unitary business, in recognition of the fact that the whole of a business is more valuable than the sum of its parts and that expenses incurred in one State contribute to revenue generated in another. *See MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1506 (2008). A net income tax with a single apportionment factor

based on sales, as in *Moorman*, can be consistent with the unitary business principle because the receipts generated in each taxing State are reduced by a share of the expenses incurred throughout the Nation that contributed to the profit generated in the taxing State.

The issues raised by the Delaware gross receipts tax bear no relation to the apportionment issues with respect to the unitary business principle addressed in *Moorman*, because the Delaware tax fails to take into account any of the economic activities generating those receipts that are concededly attributable to other States. Delaware, instead, allocates to itself *all* $700 million of petitioner's gross receipts for goods delivered to Delaware.

Accordingly, respondent's tax is just like a transaction tax imposed on the seller, because it is "measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Jefferson Lines*, 514 U.S. at 186; *see also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.") Respondent attempts to evade that fatal conclusion by asserting that its statutory scheme "is functionally equivalent to a single factor apportionment formula" applied to net income taxes. Opp. 9. But that cannot be true here,[2]

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[2] Respondent's purported apportionment formula, Opp. 9 n.1, is fallacious because it "apportions" only receipts without

(Continued on following page)

as the Delaware court conceded that the tax at issue in this case was an "*unapportioned* tax on Ford's receipts from the sales of motor vehicles." Pet. App. 2a (emphasis added). And this Court has never upheld an unapportioned transaction tax imposed on the seller. Instead, it has held that gross receipts taxes on the seller are constitutionally subject to taxation anywhere where the value underlying those receipts was generated. *Jefferson Lines*, 514 U.S. at 190; Pet. 16-20.[3]

Respondent, therefore, is wrong that no double taxation occurs as a result of its gross receipts tax. Opp. 23-26. The parties *stipulated* that petitioner paid taxes on the same gross receipts in Missouri where the *sales* of many of the vehicles to Delaware dealers occurred. Del. S. Ct. App. A00113-A00114. But even if there were no evidence of double taxation, the growing tide of duplicative gross receipts taxes by other jurisdictions where petitioner is engaged in wholesaling obviated any need to "prove actual discriminatory impact" because the Commerce Clause does not "depend on the shifting complexities of the

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accounting for out-of-state expenses (*i.e.*, activities), as required under *Moorman*. The Delaware tax is a tax on wholesaling activities, and the State concedes that significant wholesaling activities occur outside of Delaware, and yet ascribes a value of zero to those activities and a value of 100% to those within Delaware.

[3] Even if such a transaction tax were upheld, Delaware's tax would be unconstitutional because only the States where the sales occurred, not Delaware, could impose such a tax.

tax codes of 49 other states." *Armco v. Hardesty*, 467 U.S. 638, 644 (1984).

b. Notwithstanding the clear mandate of *Jefferson Lines*, some state courts, like respondent, have misread *Moorman* to approve of unapportioned gross receipts taxes. *See Illinois Commercial Men's Ass'n v. State Bd. of Equalization*, 671 P.2d 349, 358 (Cal. 1983) (*Moorman* permits "an unapportioned tax measured by the total sales of a foreign corporation within a state * * * even though major functions which contributed to the value of the taxed product * * * occur outside the taxing state."); *Chicago Bridge & Iron Co. v. Department of Revenue*, 659 P.2d 463, 469, 472 (Wash. 1983) (reading *Moorman* as giving States broad latitude to tax income that was generated in a different State). That misapprehension of *Moorman* underscores the need for this Court's review. *See MeadWestvaco*, 128 S. Ct. at 1502.

c. Moreover, respondent is wrong that *Moorman* permits the use of a "destination test" for a single-factor apportionment formula based on sales, rather than looking to where the sales (*i.e.*, transfer of title and possession) actually took place. Opp. 9-10.

In *Moorman*, both the sale (*viz.*, the transfer of title) and the delivery of the goods to the purchaser took place within the taxing State. 437 U.S. at 269. Thus, neither *Moorman* nor any other decision by this

Court has held that a State may impose a gross receipts tax on sales that occur in another jurisdiction based on the fact that the purchaser contracts to have the goods shipped interstate via common carrier.

Indeed, this Court has held that for sales taxes the State of "transfer of ownership" may tax the sale and not the place of the goods' post-sale destination. *Jefferson Lines*, 514 U.S. at 187; *see also McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328-329 (1944).[4]

In this case, the sales occurred long before they ever reached Delaware. Accordingly, even if the *Moorman* single-factor apportionment formula based upon sales were applicable, the decision below and the rulings of several other state courts, *see* Pet. 21-22, could not be sustained because *other* States where the sales actually occurred may be the jurisdictions entitled to tax the bulk of the receipts.

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[4] State courts are divided over whether the place of sale or of delivery is determinative for gross receipts taxes. *Compare Hercules Inc. v. Utah State Tax Comm'n*, 877 P.2d 133, 136-137 (Utah) (rejecting destination test for gross receipts taxes on sales of goods), *cert. denied*, 513 U.S. 1043 (1994), *with Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 810-811, 817 (Haw. 2004) (holding that gross receipts should be allocated to where the customer is located), *and Chicago Bridge & Iron Co. v. Washington*, 659 P.2d 463, 469 (Wash.) (same), *appeal dismissed*, 464 U.S. 1013 (1983). The present case also gives the Court an ideal vehicle to resolve that division among the state courts.

2. Respondent and several state Courts are misinterpreting *Tyler Pipe* to justify unapportioned gross receipts taxes

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), does not, as respondent asserts and the Delaware court concluded, Opp. 12-13; Pet. App. 14a, hold that the State where a sale occurs at wholesale may tax an unapportioned share of the seller's gross receipts realized from that sale.

As the petition discusses, Pet. 17-20, the only apportionment question resolved by *Tyler Pipe* was, where manufacturing and wholesaling occur in different States, whether the fact that "the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State" means that a gross receipts tax on wholesaling must be apportioned among both the States where the goods were manufactured and where they were sold. *Tyler Pipe*, 483 U.S. at 251. Wholesaling, *Tyler Pipe* held, is a "separate activity" for taxation purposes. *Id.*

But this Court recognized in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), that gross receipts from even a separate taxed activity (there transportation, here wholesaling) may be earned in more than one State and admonished in *Jefferson Lines*, 514 U.S. at 190, that gross receipts taxes be apportioned among those States.

3. Respondent's reliance on *Standard Pressed Steel* does not obviate the need for this Court's review

Respondent also relies upon *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), although the Supreme Court of Delaware never cited that case. But *Standard Pressed Steel*'s terse discussion of the apportionment of gross receipts has drawn steep criticism and if read as respondent urges, cannot be reconciled with this Court's subsequent apportionment precedents. Indeed, respondent's need to rely upon certain passages of *Standard Press Steel* demonstrates that confusion over this Court's precedents as to how gross receipts taxes are to be treated still exists, even though *Jefferson Lines* subsequently should have resolved that issue.

The entirety of *Standard Pressed Steel*'s discussion of apportionment of a gross receipts tax was that "the tax on the gross receipts from sales made to a local consumer" by an out-of-state manufacturer with limited in-state wholesaling activities was "'apportioned exactly to the activities taxed,' [all] of which are intrastate." *Id.* at 564 (quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 440 (1939)). This discussion has been described as a "puzzling comment" and "a single cryptic phrase [that] left unanswered the question how an 'unapportioned' tax on gross receipts can be 'apportioned exactly' to activities which were only *partially* responsible for their creation." Walter Hellerstein, *State Taxation of*

Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel *and* Colonial Pipeline, 62 Va. L. Rev. 149, 161 (1976) (emphasis added). This statement, as relied upon by respondent, cannot be reconciled with the Court's "insistence" in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938), and reemphasized later in *Jefferson Lines*, "that taxes measured by gross receipts from interstate commerce must be 'fairly apportioned to the commerce carried on within the taxing state.'" Hellerstein, *supra*, at 170 (quoting *Western Live Stock*, 303 U.S. at 256).

The only way to justify *Standard Pressed Steel*'s "stray[ing] from the apportionment principle" is if the Court were "analogiz[ing] gross receipts taxes to retail sales and use taxes." *Id.* at 171-172. But if that is the case, it comes into direct conflict with the Court's holding in *Jefferson Lines*, rejecting the analogy between gross receipts taxes and sales taxes and instead concluding that gross receipts taxes are a form of tax on income that must be apportioned. *Jefferson Lines*, 514 U.S. at 189-190.

C. Respondent Cannot Reconcile The Conflict Among State Courts Over Apportionment Of Gross Receipts Taxes

Respondent misreads the state court rulings described in the petition in an attempt to reconcile those rulings with the decision below. As the petition demonstrates, Pet. 12-16, the Delaware court's

rationale is plainly inconsistent with rulings of six other state courts. Those courts have explained that "[i]n the context of income taxes or taxes on gross receipts, apportionment must take into account the location where the revenue is generated." *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 71 (Colo. 1999); *see also City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495, 498 (Va. 1996) (explaining that because out-of-state facilities add "value * * * to the product" the taxing State cannot tax 100% of the revenue). The court below, by contrast, claims entitlement to tax the full value of the gross receipts from vehicles delivered to Delaware, even though respondent has conceded that significant economic activity generating those receipts—including the sales themselves—occurred outside the State.

Respondent thus is mistaken to suggest that the gross receipts tax at issue in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), was on the football club's total gross receipts. At issue was the constitutionality of the gross receipts tax imposed on the club's media receipts, and not revenue from other sources. Those media receipts were generated from a single contract for "the sale or transfer of exclusive rights to televise games," *id.* at 119—*i.e.*, a single sale that occurred in a single location. Under the Delaware court's holding, Philadelphia (the place of sale) could have taxed the entirety of the media receipts. But the Supreme Court of Pennsylvania held that the tax must be apportioned based on where the

underlying activity (the football games) took place. *Id.* at 132.

Respondent's attempt to reconcile the Delaware decision with *Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. Ct. App. 2002), also falls short. Although the transportation services there were performed in more than one State, the sales of those services occurred wholly within Arizona, and the goods were delivered in Arizona. Under the Delaware court's rationale, Arizona could have taxed all of the gross receipts from those sales. But the Arizona court read *Jefferson Lines* as requiring the gross receipts tax to be apportioned between Arizona and New Mexico, where the underlying transportation activities took place. *Id.* at 1013-1015 (noting that *Tyler Pipe* and *Standard Pressed Steel* are "doubtful authority in the wake of *Jefferson Lines*").

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JAMES C. OWEN
MCCARTHY, LEONARD & KAEMMERER, L.C.
400 S. Woods Mill Rd. #250
Chesterfield, MO 63017

DREW S. DAYS, III
BRIAN R. MATSUI*
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-8784

PAUL H. FRANKEL
IRWIN M. SLOMKA
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104

Counsel for Petitioner

**Counsel of Record*

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